United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1341

To be argued by
GEORGE E. WILSON

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1341

UNITED STATES OF AMERICA,

Appellee,

—v.—

ERIC LINCOLN SELIGSON,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
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GEORGE E. WILSON,
JOHN D. GORDAN, III,
Assistant United States Attorneys of Counsel.

TABLE OF CONTENTS

TABLE OF CASES

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Eric Lincoln Seligson appeals from a judgment of conviction entered March 8, 1974, in the United States District Court for the Southern District of New York after a one-day trial before the Honorable John M. Cannella, United States District Judge, sitting without a jury.

Indictment S73 Cr. 1154,* filed December 27, 1973, charged Seligson with a failure to keep his local board advised of an address where mail would reach him, in violation of Title 50 Appendix, United States Code, Section 462(a) and 32 C.F.R. § 1641.3.

* Indictment S73 Cr. 1154 superseded 68 Cr. 963, the original indictment in the case . A *nolle prosequi* has been filed with respect to the superseded indictment.

Trial took place on January 29, 1974. On February 15, 1974 Judge Cannella filed an opinion * in which he found Seligson guilty. On March 8, 1974, Seligson was sentenced to 14 months imprisonment, 2 months to be served in a jail type institution and the balance suspended and to be served on probation. Seligson was remanded to serve his sentence.

Statement of Facts

The Government's Case

The Government proved at trial that from on or about November 24, 1965 to on or about September 1, 1973 Seligson willfully failed to keep his local board advised of an address where mail would reach him.

Eric Lincoln Seligson registered with Selective Service local board 16 in New York City on September 3, 1964, (GX 1).** At the time of registration each registrant was orally informed by the registrar of his obligation to keep the local board advised of all changes in his address (Tr. 26). Seligson was also given a pamphlet entitled "Selective Service and You" (SSS Form 136) (GX 3) which advised him of the obligation to keep his local board advised of every change of address within 10 days after it occurs (Tr. 28). On September 3, 1964 Seligson signed his Classification Questionnaire (SSS Form 100), which contained the same warning in the instructions on page 1 (GX 2A). On October 12, 1964 a Selective Service Registration Card (SSS Form 2) (GX 4) was issued Seligson. This card contained the same warning (Tr. 29). On October 15, 1964 the local board classified Seligson 1-A (available for

* Judge Cannella's opinion may be found in appellant's appendix at "E".

** "GX" denotes Government exhibits and "Tr." denotes pages in the transcript.

military service). He was mailed a Selective Service Classification card (SSS Form 110) (GX 5) on October 19, 1964. This card also contained the identical warning. In all, in 7 weeks Seligson had been put on actual notice of his obligation at least 5 times.

When Seligson registered for Selective Service his address was 1370 St. Nicholas Avenue No. 30R, New York, New York. On July 19, 1965 the local board received a letter from Seligson (GX 2B) in which he gave a change of his address 272 Seventh Street, Palisade Park, New Jersey. On August 16, 1965, after Seligson had passed a physical examination, the local board received another letter from Seligson (GX 2C) in which he stated that he could no longer be reached at his old address as he was going to France. He said that he did not know the duration of his stay but could be reached through American Express in London. The letter also gave an address in the United States: 1670 Florida Street, San Francisco, California. The addresses were duly recorded on his file.

On November 15, 1965 a notice ordering Seligson to report for a second Armed Forces Physical Examination on November 24, 1965 was sent to the California address. On November 24, 1965 the board received a letter (GX 2D) from Seligson's mother, Dorothy Rodighiero, who resided at the California address, returning the notice for the physical examination and stating that she did not presently know her son's whereabouts.

On November 26, 1965 a letter was directed to Seligson at American Express in London (GX 2E). On March 17, 1966 the letter was returned stamped "Unclaimed-Not Known". Tracer letters were mailed on March 23, 1966 to Seligson grandmother, Lillian Wilson, the person Seligson had listed as the one who would always know his address (GX 2F; Item No. 9 of GX 2A), and his mother (GX 2G). Mrs. Wilson responded on March 27, 1966

giving Seligson's mother's address in California and 1350 * St. Nicholas Avenue, Bronx, New York (GX 2F). On April 8, 1966 a letter was received from Seligson's mother in California, stating that she had not heard from him since the previous November and did not know his whereabouts (GX 2G).

On March 30, 1966 Current Information Questionnaires (SSS Form 127) were mailed to both 1350 and 1370 St. Nicholas Avenue in New York, New York (GX 2H, I) and were returned as undeliverable on April 4 and 11 respectively (Tr. 40). An induction notice mailed on April 12, 1966 to the California address was not returned. On April 13, 1966 a Delinquency Notice (GX 2J) previously mailed to Seligson at the London address was returned marked "Unclaimed—Not Known". On May 12, 1966 the local board reported Seligson to the United States Attorney (GX 2K; Tr. 43).

John J. McManus, a retired Special Agent of the F.B.I., testified that he was assigned from 1966 to 1968 to locate Seligson. He sent out leads to several other cities in the United States and abroad. Although during the course of investigation Seligson was discovered to be in Zurich, Switzerland in 1967, McManus was unable to locate him (Tr. 70).

Special Agent John Hippard assumed the investigation in 1968 (Tr. 73). Approximately 20 unsuccessful leads were sent out in an attempt to locate Seligson. Seligson was then located in Canada where Hippard had him interviewed in July, 1969, concerning his intentions toward the Selective Service System. Nevertheless, Seligson did not contact his local board (Tr. 74-75).

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* Seligson's address at registration was 1370 St. Nicholas Avenue.

Thereafter, each agent in charge of this case sent leads to several different cities. Seligson's grandmother, mother, aunts, uncles and other members of his family were interviewed on a consistent basis at least once or twice a year. Each interview yielded negative results (Tr. 76, 86, 87).

In March, 1969 James Donohue, a detective with the New York Port Authority Police Department, was notified by the F.B.I. that Seligson was arriving at John F. Kennedy Airport in New York on an Air Canada flight and requested to arrest him pursuant to a federal bench warrant. Donohue and another detective met at the plane and asked the stewardess to point out Seligson as he disembarked. Seligson came down the ramp and was identified, the detectives identified themselves, and Seligson fled. They pursued Seligson, who made good his escape through a construction area at the terminal (Tr. 84).

Special Agent James Kennedy thereafter took over the case. During the time he had the case he sent out approximately 100 leads to 10 different cities (Tr. 90). As a result of one of the leads Seligson was located in Arkansas living under an assumed name.

Michael A. Richardson, a detective-lieutenant with the Blytheville, Arkansas Police Department was advised by the F.B.I. that Seligson was residing in Blytheville under the name of Eddie Watts (Tr. 92). Richardson went to Seligson's place of employment, a bakery, and saw Seligson get into his car. Richardson stopped the car and asked Seligson to produce his identification. Seligson produced a Missouri driver's license in the name of Watts, was arrested and placed in the police car. Seligson's wife then attempted to aid him in escaping by letting him out of the police car. Richardson chased Seligson about 50 feet and re-apprehended him (Tr. 95-96). At the police station Seligson admitted his true identity. He also admitted to

the F.B.I. agents shortly thereafter that he had used the aliases of Mario Yglesia, Edward Watts, Jr. and John Paul Sargeant and that his wife had used an alias when they were married (GX 6).

Defense Case

The defense presented no evidence.

ARGUMENT

POINT I

The evidence of Seligson's intent was overwhelming.

Seligson's principal argument seems to be that the government has failed to prove he had the requisite intent not to keep his Local Board advised of his whereabouts. The contention is frivolous.

The evidence is overwhelmingly clear that Seligson had actual knowledge of his obligation to keep his Local Board advised of an address where mail would always reach him. Notice of this requirement was furnished in unequivocal terms in the oral briefing routinely given to all new registrants at the time of actual registration (Tr. 25), the information pamphlet Seligson received when he registered (GX 3), the language on his registration card (SSS Form 2) (GX 4) and his Classification Card (SSS Form 110) (GX 5), and the instructions on the face of his classification questionnaire (SSS Form100) (GX 2-A), which Seligson signed on September 3, 1964, the time of his registration. The language on the cards and the questionnaire was adequate notice of Seligson's responsibilities. *United States* v. *Denas,* 436 F.2d 596, 601 (3d Cir. 1971); *Carson* v. *United States,* 411 F.2d 631, 634 (5th Cir.), *cert. denied,*

396 U.S. 805 (1969); *United States* v. *Jones*, 384 F.2d 781, 783 (8th Cir. 1967); *United States* v. *Capson*, 347 F.2d 959, 963 (10th Cir.), *cert. denied*, 382 U.S. 911 (1965). Although concededly, Seligson was not required to remain at any particular address or to report every move he made to the local board, he had the clear obligation to keep them informed of a current good address. *United States* v. *Reed*, 443 F.2d 842, 844 (5th Cir.), *cert. denied*, 406 U.S. 943 (1971). This requirement was met only if he left a chain of forwarding addresses by which mail sent to him *might reasonably have been expected to come into his hands in time for compliance*. *Bartchy* v. *United States*, 319 U.S. 484 (1943).

There was ample evidence from which the Court was justified in finding that with knowledge of his obligation Seligson wilfully failed to keep his Local Board advised. On two previous occasions he furnished changes of addresses (GX 2B and C). However, the last two addresses he furnished in 1965 proved to be little more than "dead letter" boxes. His mother, who resided at the California address Seligson furnished, could provide no information as to his whereabouts. *United States* v. *Buckley*, 452 F.2d 1088 (9th Cir. 1971); *United States* v. *Booth*, 454 F.2d 318, 322 (6th Cir. 1972); *United States* v. *Williams*, — F. Supp. —, 73 Cr. 383 (S.D.N.Y. 1973) (MacMahon, *D.J.*). Mail was returned from American Express in London unclaimed. *United States* v. *Haug*, 150 F.2d 911 (2d Cir. 1945). Moreover, the person listed as the one who would always know his address (his grandmother, Lillian Wilson) was unable to furnish a good address. *United States* v. *Secoy*, 481 F.2d 225, 228 (6th Cir. 1973); *Kokotan* v. *United States*, 408 F.2d 1134, 1137 (10th Cir. 1969); *United States* v. *Booth*, *supra*.

While the Government has the burden of establishing criminal intent in a prosecution for a registrant's failure

to keep his local board advised of his address, that burden is sustained, as it was here, by proof that the registrant, although aware of his obligation, deliberately refrained from complying with it. *United States* v. *Wood,* 446 F.2d 505 (9th Cir. 1971); *United States* v. *Couming,* 445 F.2d 555, 557 (1st Cir.), *cert. denied,* 404 U.S. 949 (1971); *United States* v. *Day,* 442 F.2d 1034 (9th Cir. 1971). This willfulness on Seligson's part was amply shown by the fact that after twice notifying the Local Board of changes of address Seligson dropped out of sight and could not be reached through the addresses he furnished or through members of his family; that after being interviewed in Canada in 1968 about his Selective Service obligations he did not contact his Local Board; and that he fled from Port Authority detectives in March of 1969 and attempted to escape from the Arkansas police in the Fall of 1973. Last and most significant is the evidence of Seligson's use of several aliases in order to avoid any contact with the Draft. *United States* v. *Mostafavi-Kashani,* 469 F.2d 224 (9th Cir. 1972).

POINT II

Seligson's motion to inspect the grand jury minutes was properly denied.

Seligson claims that Judge Cannella erred in denying his pre-trial motion to inspect the minutes of the Grand Jury proceedings on Indictment 68 Cr. 963. The claim is wholly frivolous.

Seligson was originally arrested and removed to the Southern District of New York on Indictment 68 Cr. 963, filed December 2, 1968, charging him in three counts with failure to advise his local board of an address where mail would reach him from November 15, 196[illegible] to the date the indictment was filed, failure to report for an Armed Forces Physical Examination from November 24, 1965, to the date

the indictment was filed and failure to report for induction from April 25, 1966, to the date the indictment was filed. On December 27, 1973, superseding Indictment 73 Cr. 1154 was filed, charging Seligson in one count with failure to keep his local board advised of an address where mail would reach him between November 24, 1965 and September 1, 1972. It was on this superseding indictment that Seligson was tried on January 29, 1974, and convicted.*

Before the superseding indictment was returned, Seligson moved for disclosure of minutes of the Grand Jury proceedings on the earlier indictment (68 Cr. 963) on the ground that its three counts were inconsistent, a claim he repeats on appeal, and on other grounds now abandoned. Fed. R. Crim P. 6(e). Judge Cannella denied the motion by order with memorandum opinion filed December 5, 1973 (Appellant's Appendix E).

The short answer to Seligson's claim is that it is completely foreclosed by the fact that he was neither tried nor convicted on Indictment 68 Cr. 963. That indictment was superseded and subsequently nollied. Had Seligson been allowed to inspect the Grand Jury minutes, it would only have been for the purpose of enabling him to move for dismissal of the indictment because of alleged irregularities in the Grand Jury proceedings. Fed. R. Crim. P. 6(e). Seligson has no basis whatsoever for complaint, since Indictment 873 Cr. 1154, which superseded Indictment 68 Cr. 963, lacks the alleged defect on which his motion was based.

Moreover, even if there had been no superseding indictment, the claimed inconsistency between the counts in Indictment 68 Cr. 963 was hardly a ground for disclosure of

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* Seligson's repeated assertions that the superseding ". . . indictment came down after the trial had begun" (Brief at iii, 1) are both astonishing and totally incorrect.

the Grand Jury minutes. It is obvious from the facts of the case that the two failure-to-report counts in Indictment 68 Cr. 963 were premised on the view that Seligson was criminally liable for failure to obey the orders to report for a physical examination and, later, for induction since he failed to receive the orders only because he deliberately prevented his local board from reaching him by mail. *Cf.*, e.g., *United States* v. *Cohen*, 450 F.2d 1019, 1021 (5th Cir. 1971). Moreover, it would have been perfectly proper to try and convict Seligson on three counts of the kind found in Indictment 68 Cr. 963 providing a showing were made, as it could have been here by the substance of Seligson's interview in Canada in 1969, that although the local board had no address to send mail to Seligson, he did have actual notice of the outstanding orders independent of his local board. *United States* v. *Williams*, 433 F.2d 1305 (9th Cir. 1970).

Even assuming that this view of the law was wrong, it was a matter for election by the Government among the counts or for a judgment of acquittal on the appropriate counts at the close of the Government's case at trial. Nothing in the testimony before the Grand Jury would have had any bearing on the matter, and it can therefore hardly be said that Judge Cannella abused his discretion in denying Seligson's motion to inspect the Grand Jury minutes. See *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 399 (1959).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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May 31, 1974

Received on May 31, 1974 two copies of the United States Court of Appeals Brief in United States v. Seligson.

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